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HOW CAN THEY KEEP CALLING ME? EXEMPTIONS AND LOOPHOLES IN THE TELEPHONE CONSUMER PROTECTION ACT AND THE NEED FOR FURTHER REGULATION

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I. INTRODUCTION

It is a scenario with which most of us are far too familiar. You are sitting down to dinner or watching TV and the phone rings. You hope that it is a friend or family member calling, but most of the time, there is silence on the other end of the line as the telemarketer on the other end waits for the predictive dialing device to notify him or her that you have picked up.¹ Such devices are responsible for ninety percent of

¹Predictive dialer systems use computers to dial many telephone lines at the same time and then connect the calls to live operators who either deliver live messages or ask the recipient to listen to prerecorded messages. Their purpose is to weed out busy tones, answering machines, and numbers for which there is no answer. The goal is that a live call will be "waiting for telemarketers the second they hang up from the previous call." See Kelly Thornton, *State*

all telemarketing calls.² Before you get the chance to hang up, the obnoxious telemarketer launches into a sales pitch. At the end of the annoying soliloquy, the seller says that all they need to do is “verify” some information in order for you to complete the purchase. It is at this point most of us say “no thank you” and hang up.

Some people say they ignore the call and go back to their daily routine. However, by simply answering the phone the would-be consumer has already been disturbed. Indeed, in such an advanced telecommunications society, it is very difficult to ignore a ringing phone. As one commentator has put it, “[t]he telephone should not be used as a vehicle for advertising. Unlike mail, or radio, or television commercials, the telephone cannot be ignored at leisure. It demands sudden and undivided attention.”³ The telephone has also been called a “uniquely invasive technology” because it essentially “allows solicitors to come ‘into’ the home.”⁴ Moreover, consumer groups estimate that telemarketers, with the aid of computer technology, make up to twenty-four million calls a day nationally.⁵ Nonetheless, the telemarketing industry raked in a staggering \$612 billion in 2000 and, at that rate, it seems like the telemarketers are here to stay.⁶

There are federal and state laws that exist to help telephone subscribers combat the problem, however, these laws are vastly inadequate. Much of the current legislation exempts nonprofit organizations and charities even though commercial and noncommercial calls inflict the same disturbance upon residential privacy.⁷ Even Congress has acknowledged that residential telephone subscribers that are considered any unsolicited telephone call, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.⁸ The good news, however, is that states are beginning to pass legislation to further protect residential telephone subscribers above and beyond the protections of federal law.⁹ Additionally, consumers are beginning to understand their rights under federal law and are exercising them through private actions against the telemarketers.¹⁰ However, the

Moves To Clamp Down on Telemarketing Hang-Ups; Beyond Being a Nuisance, Phantom Calls Frighten Many, SAN DIEGO UNION & TRIBUNE, Aug. 13, 2001, at A1.

²Arthur Winston, *DM and Commercial Speech*, DM NEWS, Feb. 22, 1993, at 18.

³Joseph R. Cox, *Telemarketing, The First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL’Y 403, 403-04 (1996).

⁴*Id.* at 420.

⁵Thornton, *supra* note 1, at A1.

⁶CNN Today: Several States Considering Legislation That Would Restrict Telemarketing (CNN television broadcast, Jan. 12, 2001) (transcript available in LEXIS, News, Transcript # 01011211V13).

⁷*Moser v. FCC*, 811 F. Supp. 541, 545 (D. Or. 1992).

⁸137 CONG. REC. H11307 (daily ed. Nov. 26, 1991).

⁹5.6 Million People in 13 States say “Don’t Telemarket to Me,” COMMUNICATIONS DAILY, September 5, 2001, available at 2001 WL 5053940 [hereinafter COMMUNICATIONS DAILY].

¹⁰In Ohio alone, several individuals have exercised their right to sue telemarketers. Some have even sued multiple times against multiple telemarketers and have collected significant damages. See *Irvine v. Akron Beacon Journal*, No. 20450, 20524, 2002 WL 24324 (Ohio Ct.

laws that regulate telemarketing do not apply to all organizations, and these loopholes must be closed in order to protect consumers from the seemingly constant barrage of telemarketing calls.

The first section of this Note examines the relevant federal laws that are already in place to assist the frustrated public in avoiding these unwanted calls. The second section discusses the constitutionality of such legislation and why it is considered to improperly limit the freedom of commercial speech. The third section focuses upon what the states have done to supplement the federal law and increase regulation as well as the proposed changes in the federal law itself. The fourth section analyzes the ineffectiveness of the federal and state regulations in place and specifically argues against the allowance of exceptions in these laws, including those for nonprofit organizations, charities, and companies with which the consumer has an established business relationship.

II. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

A. *Legislative History*

In 1991, the public's frustration at unwanted telephone solicitations became so adamant that Congress was forced to respond. It passed the Telephone Consumer Protection Act (hereinafter TCPA) which regulates the telemarketing industry so as to protect consumers from unwanted telephone solicitations.¹¹ According to one of the Act's framers, Edward J. Markey of Massachusetts, the TCPA was an attempt by Congress to balance an individual's right to privacy in the home with the advances made in the telemarketing industry.¹² Among other things, the law regulates automated telephone equipment, fax machines, and live telemarketing.¹³ Specifically, the TCPA effectively prohibits telemarketers from using devices that employ artificial or pre-recorded voices without the prior consent of the recipient.¹⁴ It also creates private rights of action as a way of empowering consumers to hold telemarketers responsible for repeated calls over the recipient's objections.¹⁵ According to the Act, if any person receives more than one unsolicited phone call in violation of the Act, that person can pursue a private right of action against the entity

App. 9th Dist. Jan. 9, 2002) (finding newspaper liable for violations of Telephone Consumer Protection Act (hereinafter TCPA)); *Adamo v. AT&T*, No. 79002, 2001 WL 1382757 (Ohio Ct. App. Nov. 8, 2001) (affirming judgment for plaintiff against defendant AT&T for violations of TCPA); *Charvat v. Dispatch Consumer Serv.*, 769 N.E.2d 829 (Ohio 2002) (holding that plaintiff effectively terminated his "established business relationship" with newspaper by requesting to be placed on a "do-not call" list); *Charvat v. Colorado Prime*, No. 97APG09-1277, 1998 WL 634922 (Ohio Ct. App. Sept. 17, 1998) (reducing plaintiff's judgment because original telemarketing call does not count as a violation of TCPA); *Charvat v. ATW, Inc.*, 712 N.E.2d 805 (Ohio Ct. App. 1998) (holding that no private right of action accrues under TCPA unless telemarketer calls more than once in a twelve-month period without consumer's consent).

¹¹Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227 (2002).

¹²*See* 137 CONG. REC. E793-02 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹³*See* 47 U.S.C. § 227.

¹⁴§ 227(b)(1)(A).

¹⁵§ 227(b)(3), (c)(5).

in violation.¹⁶ Such an action must be brought in an “appropriate” state court and can be filed to enjoin such a violation, or to “recover actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater[.]”¹⁷ In addition, the TCPA also allows a state to bring a civil action against an entity if the state believes that the entity has engaged in a pattern or practice in violation of the TCPA.¹⁸

More importantly, the TCPA directs the Federal Communications Commission (hereinafter FCC) to use its regulatory power to formulate additional regulations to meet the requirements of the Act.¹⁹ For instance, Congress invited the FCC to consider a host of methods and procedures for regulating unsolicited sales calls, including “the use of electronic databases, telephone network technologies, special directory markings, [and] industry-based or company-specific ‘do not call’ systems. . . .”²⁰ Congress also gave the FCC the option of developing a national “do not call” database, which would entail the compilation of a national “list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”²¹

Since the enactment of the TCPA, the FCC has responded to Congress’s suggestions and has established its own set of regulations.²² However, the FCC chose not to establish the national database, and left the creation and maintenance of the “do-not-call” lists up to the telemarketers themselves.²³ Also, the FCC regulations state that a telemarketer must clearly state the name of the business or individual initiating the call as well as the telephone number or address of the business or individual.²⁴ Furthermore, the regulations prohibit any telemarketer from calling between the hours of 9 p.m. and 8 a.m. local time at the called party’s location.²⁵ Combined with the TCPA’s private right of action, any consumer can potentially use a violation of these regulations to initiate a lawsuit against a

¹⁶§ 227(b)(3).

¹⁷§ 227(c)(5)(B).

¹⁸§ 227(f).

¹⁹§ 227(b)(2).

²⁰§ 227(c)(1)(A).

²¹§ 227(c)(3).

²²*See* 47 C.F.R. § 64.1200 (2001).

²³47 C.F.R. § 64.1200(e)(2)(i) (“Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.”); § 64.1200(e)(2)(iii) (“If a person or entity making a telephone solicitation...receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber’s name and telephone number on the do-not-call list at the time the request is made.”); § 64.1200(e)(2)(vi) (“A person or entity making telephone solicitations must maintain a record of a caller’s request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.”).

²⁴47 C.F.R. § 64.1200(d).

²⁵47 C.F.R. § 64.1200(e)(1).

telemarketer.²⁶ However, a consumer is not likely to succeed if the telemarketing entity can prove that it has instituted measures to effectively prevent telephone solicitations in violation of the TCPA and FCC regulations because the TCPA expressly makes evidence of such efforts an affirmative defense.²⁷

The TCPA also permits the FCC to exempt from these regulations those calls made by noncommercial entities, including nonprofit organizations and charities, as well as those entities with which the recipient already has an established business relationship.²⁸ According to one commentator, “Representative Markey claimed that such an exception was ‘common sense,’ and that consumers do not mind certain classes and categories of calls, presumably charitable, political, research, and other noncommercial calls.”²⁹ However, the TCPA grants the FCC authority to reconsider these exceptions.³⁰ To date, the FCC has allowed charities, nonprofit organizations, and political groups to be exempt from the regulations. Thus, many state laws, following the FCC’s lead, allow these exemptions to exist as well.³¹

B. Private Right of Action

1. Federal Jurisdiction vs. State Jurisdiction

Although the TCPA is federal law, it expressly gives states jurisdiction to hear any private right of action consumers may bring against a telemarketing entity.³² Senator Ernest Hollings, the bill’s sponsor, defended such an express grant of jurisdiction.³³ Hollings believed that if consumers were to bring private actions against violators of the TCPA, state jurisdiction would make it as easy as possible on such consumers.³⁴ Specifically, Senator Hollings envisioned that consumers would

²⁶See cases cited *supra* note 10. Many individuals who have filed suit have been successful by simply alleging that the telemarketers did not send a written copy of their do-not-call policy or that the telemarketers failed to provide the party called with a full name and/or address of the telemarketing entity.

²⁷47 U.S.C. § 227(c)(5)(C) (2002) (“It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.”).

²⁸§ 227(a)(3). See *infra* text accompanying note 187 (for a definition of “established business relationship”).

²⁹Howard E. Berkenblit, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 99 (1994).

³⁰47 U.S.C. § 227(c)(1)(D) (2002) (“[T]he Commission shall initiate a rulemaking proceeding...[and] the proceeding shall—consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section...”).

³¹See *infra* notes 108-11 and accompanying text.

³²47 U.S.C. § 227(b)(3), (c)(5).

³³See *infra* note 34 and accompanying text.

³⁴See *Chair King Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (S.D. Tex. 1997) (“Senator Hollings indicated the intent of the bill was for consumers to easily be able to

bring pro se actions in state small claims courts because he did not want the consumer burdened with having to litigate in common pleas courts and pay substantial attorneys' fees.³⁵ Senator Hollings wanted to ensure that there was an appropriate enforcement mechanism in place because, at the time the bill was proposed, the FCC went on record that it was not persuaded that any kind of legislation regulating telemarketing was necessary to address consumer complaints.³⁶ Therefore, knowing the FCC's lack of desire for enforcement, Senator Hollings wanted to be sure that citizen enforcement would be effective and that states would be able to facilitate such a citizen enforcement scheme.³⁷

To be sure, the fact that a state court can have original jurisdiction in cases arising under federal law is nothing new.³⁸ By sharing jurisdiction with the national government, the states ensure that the scales on the balance of power are not unfairly tipped toward the federal government. Still, the U.S. Constitution provides that federal law "shall be the supreme Law of the Land" and is controlling on every court subject to it.³⁹ Therefore, states not only have the authority to hear cases arising under federal law, but may be obligated as well. Moreover, because the TCPA appears to grant exclusive jurisdiction to the states to hear private actions, the jurisdictional issues may become more complex.

2. Can the States Opt-Out?

Because the TCPA is a federal law that grants the states express jurisdiction to hear cases arising from violations of the law, it creates controversy regarding any discretion the states may have in interpreting the law or even choosing to hear the cases at all. In his article, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, Robert Biggerstaff addresses the jurisdictional questions raised by the text of the TCPA as well as the states' obligations to facilitate Senator Hollings' vision of a citizen enforcement scheme.⁴⁰

enforce the bill by recovering damages. He emphasized states should facilitate this by providing fora in which consumers could appear without an attorney.").

³⁵137 CONG. REC. S16204-01 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings), ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney. ...However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.").

³⁶See Biggerstaff, *infra* note 40, at n.66 (quoting FCC Chairman Alfred C. Sikes) ("It is not clear, however, that sweeping Federal legislation is required....[T]his may be a situation where continued regulatory scrutiny and monitoring, subject to Congressional review and oversight, is preferable to passage of legislation." (citations omitted)).

³⁷See 137 CONG. REC. S16204-01, *supra* note 35.

³⁸See The Federalist, No. 82, at 132 (Alexander Hamilton) (Edward Gaylord Bourne ed. 1947) ("When...we consider the State governments and the national governments, as they truly are,...as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.").

³⁹U.S. CONST. art. VI, cl. 2.

⁴⁰Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?* 33 CONN. L. REV. 407 (2001).

Biggerstaff argues that the TCPA is “no different from any other federal law in regard to a state court’s ability and obligation to hear such cases,” and therefore, the states do not have to formulate separate legislation that conforms to the TCPA in order to hear such actions.⁴¹ However, in *International Science & Technology Institute v. Inacom Communications, Inc.*,⁴² the Court of Appeals for the Fourth Circuit suggested that states are allowed to “opt-out” and close their courts to actions under the TCPA.⁴³ In response, Biggerstaff argues that the *International Science* rationale is in error because a state does not have the authority to “arbitrarily close its courts to TCPA actions while allowing similar state claims, any more than a state could close its courts to FELA, RICO, or other federal causes of action.”⁴⁴

If a state were allowed to “opt-out” of the TCPA’s citizen-enforced, regulatory scheme, that state would be able to deny the enforcement of a federal law in its own court system, thereby affecting the “very foundation of federal supremacy.”⁴⁵ A more plausible interpretation of the TCPA’s ambiguous language⁴⁶ is that Congress intended not only that states could hear cases brought under the TCPA without additional state legislation, but also that states do not have the authority, absent an explicit statement from Congress, to “opt-out” and refuse to hear such cases.⁴⁷

III. THE CONSTITUTIONALITY OF THE TCPA

For the most part, the TCPA regulates commercial speech. Combined with the language of the Act, as well as the FCC regulations, the TCPA dictates how and when a telemarketer may make an unsolicited call to a residential telephone subscriber.⁴⁸ As a consequence, the TCPA has undergone substantial constitutional

⁴¹*Id.* at 408.

⁴²*Int’l Sci. & Technical Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997). Plaintiff argued that a private right of action pursuant to the TCPA could only be brought if there was state legislation that provided for a similar private action. *Id.* The plaintiff’s reasoning was that if a state had not passed “opting-in” legislation, then any citizen of that state would have to bring the case in Federal Court or else there would be an Equal Protection Clause violation. *Id.* The court rejected this reasoning by holding simply that there was no requirement for states to “opt-in” in order to hear claims brought under the TCPA. *Id.*

⁴³Biggerstaff, *supra* note 40, at 408 (Biggerstaff also defines the terms “opt-in” and “opt-out.” The former means an “action by a state legislature that singles out the TCPA; for example a state law which provides: ‘Civil suits, under 47 U.S.C. § 227 are hereby authorized to be heard in the courts of this State.’” The latter “refers to a state legislature enacting a law that carves out a specific exception for the TCPA; for example, a state law that provides: ‘Civil suits, under 47 U.S.C. § 227 may not be heard in the courts of this State.’”).

⁴⁴*Id.* (citations omitted).

⁴⁵*Id.* at 426.

⁴⁶47 U.S.C. § 227(b)(3), (c)(5) (2002).

⁴⁷Biggerstaff, *supra* note 40, at 427-28. Biggerstaff concludes that “it is unquestioned that states cannot obstruct the operation of federal laws....Congress has implemented citizen suits as a primary enforcement mechanism in many statutes and has never provided that a state may close its courts to such enforcement.” *Id.*

⁴⁸*See generally* 47 C.F.R. § 64.1200 and 47 U.S.C. § 227.

scrutiny since its enactment.⁴⁹ Many scholars and judges have rendered their own interpretations of the law, but the controversy still exists.⁵⁰ One reason why this area of federal law is still quite unsettled is because most actions brought under the TCPA are brought in state small claims courts, as Senator Hollings envisioned.⁵¹ As one commentator put it, “state small claims courts (over which Holmeses, Hands, and Cardozos rarely preside) are poor forums for producing uniform interpretations of federal law,” and thus “essentially insures that few TCPA cases will result in reasoned appellate decisions.”⁵²

A. Regulation of Commercial Speech

When Congress enacted the TCPA, the goal was to be able to regulate the telemarketing industry by balancing the residential telephone subscriber’s privacy rights against the telemarketers’ free speech rights.⁵³ Originally, commercial speech was not afforded First Amendment protection,⁵⁴ but gradually the Supreme Court began to recognize some protection for this type of speech.⁵⁵ The Court reasoned that “the free flow of commercial information” was critical in order for consumers to be able to make intelligent and well-informed purchasing decisions.⁵⁶ However, the Supreme Court has also recognized that commercial speech, while important, should not be afforded the same kind of protection as other forms of speech.⁵⁷ This difference in treatment was formulated because commercial speech was regarded as more durable than other forms of speech, and it was easier to verify.⁵⁸

Thereafter, in 1980, the Supreme Court developed a four-part test in order to examine acceptable restraints on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵⁹ First, in order to come within the

⁴⁹See Deborah L. Hamilton, Note, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 MICH. L. REV. 2352 (1996).

⁵⁰*See id.*

⁵¹*See supra* note 34 and accompanying text.

⁵²Robert R. Biggerstaff and Hilary B. Miller, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 669 (2000).

⁵³See Lisa Boardman Burnett and Consuelo Lauda Kertz, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1060 (1992).

⁵⁴*See* *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁵⁵*See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

⁵⁶*Id.* at 736-65.

⁵⁷*Id.* at 770-71, n.24.

⁵⁸*Id.* See also Boardman & Kertz, *supra* note 53, at 1042.

⁵⁹*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). (allowing electrical utility to bring suit in New York State court to challenge the constitutionality of a regulation of the New York Public Service Commission that completely banned promotional advertising by the utility).

purview of the First Amendment, the speech must concern lawful activity and not be misleading.⁶⁰ Second, the government's interest in promoting the restriction against the commercial speech must be substantial.⁶¹ If the answer to both of these questions is yes, a court must then determine "whether the regulation directly advances the governmental interest asserted, and [finally], whether it is not more extensive than is necessary to serve that interest."⁶² According to the *Central Hudson* test, the TCPA is constitutional as long as the government's interest in the right to privacy of a residential telephone subscriber is substantial, and the TCPA itself "directly advances the governmental interest" and is "not more extensive than is necessary to serve that interest."⁶³

The Supreme Court has also formulated a different constitutional test to examine acceptable restraints on commercial speech. This method of analysis is the "time, place, or manner" test, and was defined and illustrated by the Supreme Court in *Cincinnati v. Discovery Network, Inc.*⁶⁴ In that case, commercial publishers brought a civil rights action, requesting declaratory and injunctive relief against the enforcement of a Cincinnati ordinance, which prohibited distribution of "commercial handbills" on public property, and was used as a basis of ordering the removal of newsracks that the publishers used to generate business.⁶⁵ The publishers argued that the ordinance distinguished the newsracks based on the content of the materials inside because the ordinance did not ban newsracks that sold regular newspapers as opposed to the free "magazines" offered by the plaintiffs.⁶⁶

The Court rejected Cincinnati's argument that the ordinance was only regulating the time, place, and manner of the distribution of the plaintiffs' magazines, which is allowable provided that the government is adequately justified "without reference to the content of the regulated speech."⁶⁷ The Court held that although the city has the right to regulate the time, place, and manner of commercial speech, it could not do so if the magazines were banned due to the "content of the publication resting inside that newsrack."⁶⁸ The Court reasoned that the ban was "content based," and therefore unconstitutional.⁶⁹ Ultimately, the "time, place, and manner" test is essentially identical to the "commercial speech" test except for the non-content based

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

⁶⁵*Id.* at 412-13.

⁶⁶*Id.* at 419 (The plaintiffs distributed free publications regarding adult educational, recreational, and social activities as well as many advertisements, including, but not limited to, real estate listings. Basically, the ordinance sought to prevent these free advertisements from becoming sidewalk litter, as they often did.).

⁶⁷*Id.* at 428 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting *Clark v. Comty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁶⁸*Discovery Network*, 507 U.S. at 429.

⁶⁹*Id.*

requirement. The remainder of the “time, place, and manner” test is intermediate scrutiny, which means that government restrictions must be narrowly tailored to serve a significant government interest.⁷⁰ Basically, there must be a “reasonable fit” between the means employed and the ends sought, and there must be “ample alternative channels for communication of the information.”⁷¹

Moser v. FCC was one of the first cases that specifically challenged the constitutionality of the TCPA.⁷² In that case, the National Association of Telecomputer Operators (hereafter NATO) brought an action against the FCC.⁷³ Because the TCPA banned the use of automated devices,⁷⁴ NATO argued that the law created a content-based restriction not narrowly tailored to further a substantial government interest, and therefore violating the First Amendment and the “time, place, and manner” test illustrated by *Cincinnati v. Discovery Network, Inc.*⁷⁵ NATO also claimed that the TCPA violated the Equal Protection Clause of the Fifth Amendment.⁷⁶ In analyzing the Act, the Ninth Circuit classified the TCPA as a “content-neutral, time, place and manner restriction” because nothing in the TCPA required the FCC to differentiate between commercial and noncommercial speech insofar as its prohibition on automated devices was concerned.⁷⁷ Ultimately, the court held that the TCPA could constitutionally ban all automated telemarketing calls without having to ban all other telemarketing calls.⁷⁸ This “underinclusiveness” approach did not render the TCPA unconstitutional because underinclusiveness only constitutes a violation when “a regulation represents an attempt to give one side of a debatable public question an advantage in expressing its views to the people.”⁷⁹

B. Is a Complete Ban Unconstitutional?

The *Moser* court did not specifically say that a complete ban on all telemarketing calls would be unconstitutional because the issue did not have to be addressed for adjudication.⁸⁰ However, the court seemingly left the door open for such a ban, just as the TCPA had done by allowing the FCC to consider whether further restrictions on telemarketing would be necessary.⁸¹ To date, there is little authority on the constitutionality of a complete telemarketing ban, but the First Amendment arguably

⁷⁰Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

⁷¹Cox, *supra* note 3, at 408 (citations omitted).

⁷²Moser v. FCC, 46 F.3d 970 (9th Cir. 1995).

⁷³*Id.* at 973.

⁷⁴47 U.S.C. § 227(b)(1)(A).

⁷⁵Moser, 46 F.3d at 973.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.* at 975.

⁷⁹*Id.* at 974 (citing First National Bank v. Bellotti, 435 U.S. 765, 785-86 (1978)).

⁸⁰See Moser, 46 F.3d 970.

⁸¹47 U.S.C. § 227(c)(1)(D).

ensures that such a ban would likely be held unconstitutional.⁸² Both commercial speech and speech made by tax-exempt, nonprofit organizations involve a number of First Amendment implications;⁸³ a complete ban would have to withstand the First Amendment's free speech guarantees. Furthermore, a complete ban, although a seemingly good solution to the most frustrated of residential telephone subscribers, is not supported in most laws regulating telemarketing.⁸⁴ Indeed, almost every piece of state and federal legislation, including the TCPA, allows for the exemption of certain types of calls, most notably nonprofit organizations, charities, and political groups.⁸⁵

However, Joseph Cox has argued that under the present law, including the *Central Hudson* and *Discovery Network* tests, a complete ban on all telemarketing calls "without prior knowledge of consent" would be constitutional.⁸⁶ Under this reasoning, telemarketers could only call if the recipient had previously consented to being called. This, in turn, would be spinning the "presumption back on its feet," meaning "it presumes people do not want to be solicited absent a request ... instead of presuming they want to be called."⁸⁷ In acknowledging the widespread exemption of charities and nonprofits, Cox retreats and argues that any law which seeks to regulate telemarketing should leave these exemptions in place, even if the government gathered information which revealed that most people do not want to be bothered by charitable solicitations either.⁸⁸

Why are charities and nonprofits excluded in the first place? Historically, charitable speech has been afforded more protection than commercial speech.⁸⁹ According to one court, "charitable solicitation involves a variety of speech interests protected by the First Amendment; therefore, it is not purely 'commercial speech,' and it is subject to traditional 'strict scrutiny' under the First Amendment."⁹⁰ Unlike the commercial speech tests of *Central Hudson* and *Discovery Network*, charitable and nonprofit speech is judged by a higher constitutional standard than pure commercial speech.⁹¹ Furthermore, under this "strict scrutiny" test, "[a] restriction subject to strict scrutiny must be narrowly tailored to achieve a compelling state interest."⁹²

⁸²See Hamilton, *supra* note 49.

⁸³*Id.*

⁸⁴See *infra* note 109 and accompanying text.

⁸⁵*Id.*

⁸⁶Cox, *supra* note 3, at 421.

⁸⁷*Id.* at 422.

⁸⁸*Id.* at 423.

⁸⁹*Virginia Citizens Consumer Council*, 425 U.S. 748.

⁹⁰*Am. Ass'n of State Troopers, Inc. v. Preate*, 825 F. Supp. 1228, 1232 (M.D. Pa. 1993) (citing *Riley v. Nat'l Fed'n of the Blind Inc.*, 487 U.S. 781, 787-88 (1988)).

⁹¹*Id.*

⁹²*State Troopers, Inc.*, 825 F. Supp. at 1232 (citing *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992)).

However, it would seem as though a complete ban on telemarketing calls both commercial and noncommercial alike would be achieving a “compelling state interest” if the vast majority of citizens of a particular jurisdiction wanted such a ban. Conceivably, the courts could balance the privacy interests of residential telephone subscribers with the speech interests of telemarketers and decide that the privacy interests were greater. Indeed, “[a]ll of the courts have consistently held that the privacy right of the home is a significant interest.”⁹³

Furthermore, whether the deciding court uses the “time, place, and manner” test, the *Central Hudson* four-part test, or strict scrutiny, a complete telemarketing ban could still be found constitutional. Assuming strict scrutiny is used, which is the most difficult test to satisfy of the three, the government would have to show that the regulation was “narrowly tailored” and that the state interest was “compelling.”⁹⁴ Arguably, a complete ban might not be seen as narrowly tailored if there were a less restrictive means of achieving the same objective. However, the government could then show that the only reasonable means of ensuring a residential telephone subscriber’s privacy is indeed a complete ban. Such an argument could also be bolstered by a finding of overwhelming support in the particular state or jurisdiction for a complete ban. In addition, the ban itself would not have to be total. As Cox notes, a constitutional ban would only have to apply to those consumers who did not wish to be called.⁹⁵ Therefore, it appears that a complete ban on all telemarketing calls, both commercial as well as nonprofit, could survive constitutional scrutiny. As Cox argues, “there are likely no constitutional limitations to banning telemarketing calls to all people except those who have expressed a desire to receive them. Congress or the states should feel secure in their authority to take additional steps to protect their citizens from a disliked, if not loathed, practice.”⁹⁶

IV. FURTHER REGULATION: THE DO-NOT-CALL APPROACH

When the TCPA was enacted, Congress authorized the FCC to establish its own regulations regarding telephone solicitations.⁹⁷ In enacting these regulations,⁹⁸ the FCC decided not to establish a national do-not-call database.⁹⁹ Instead, the FCC chose to leave the do-not-call list implementation to the telemarketing entities.¹⁰⁰ In response, the states have begun to pass legislation creating their own do-not-call

⁹³Cox, *supra* note 3, at 420.

⁹⁴*State Troopers, Inc.*, 825 F. Supp. at 1232.

⁹⁵Cox, *supra* note 3, at 421-22 (“Therefore, the government should...fashion restrictions so they do not amount to a blanket ban but...only a ban on calls made without prior knowledge of consent. Essentially, this takes regulations one step further than ‘do-not-call’ lists: the homeowner does not have to endure even a single call from each telemarketer.”).

⁹⁶*Id.* at 423.

⁹⁷47 U.S.C. § 227(b)(2) (2002) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”).

⁹⁸*See* 47 C.F.R. § 64.1200 (2002).

⁹⁹*See supra* note 23 and accompanying text.

¹⁰⁰*Id.*

databases¹⁰¹, and the idea of a national do-not-call database has again been proposed.¹⁰² However, there are many real and potential problems involved in establishing such databases, and those that have already been established continue to face criticism for lack of effectiveness as well as poor cost efficiency.¹⁰³

A. State Regulation

As of September 2001, fourteen different states had enacted “no call” laws, which allow residential telephone subscribers to register their names and/or numbers with telemarketers as those not to be called.¹⁰⁴ The largest lists belong to New York and Missouri, which have amassed 1.8 million and 1.5 million names respectively.¹⁰⁵ Almost all of these laws prescribe heavy penalties ranging from \$2,000 per violation to \$25,000, and the telemarketers must pay an annual fee in order to consult the state lists, which are usually published quarterly.¹⁰⁶ According to Gryphon Networks, a company that specializes in providing no-call list administrative services, twenty-six additional states are considering some kind of no-call legislation, further proving that consumers have had enough of pesky telemarketers and are influencing their own state legislatures to address the problem.¹⁰⁷ In effect, the flood of recent state legislation is “a signal of how unpopular telemarketing has become among Americans.”¹⁰⁸

While many consumers are delighted at the flood of state action against telemarketers, the resulting legislation is not immune from criticism. According to one commentator, “a myriad of exemptions and lax enforcement in many states threaten their ultimate effectiveness.”¹⁰⁹ Moreover, “the statutes are layered with exemptions for charities, political groups, and companies that already have a

¹⁰¹See COMMUNICATIONS DAILY, *supra* note 9.

¹⁰²Robert Hager, *Hotline to Stop Telemarketers*, (Jan. 22, 2002), available at <http://www.msnbc.com/news/692357.asp?pne=ms>.

¹⁰³See Michael E. Shannon, *Combating Unsolicited Sales Calls: The “Do-Not-Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS 381 (2001).

¹⁰⁴See COMMUNICATIONS DAILY, *supra* note 9.

¹⁰⁵*Id.* (The other states include Conn., 750,000 names; Tenn., 636,000; Ga., 224,500; Fla., 143,400; Ky., 123,000; Ind., 115,000; Or., 43,000; Idaho, 38,700; Ark., 16,000; Alaska, 5,300; Wis., N/A. Colorado also has 230,000 maintained by Bighorn Center, a nonprofit association, which will be added once the law is enacted in 2002. The total number of names on statewide do-not-call lists is upwards of 5.6 million.).

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸Craig Savoye, *States Spare Residents from Telemarketers*, CHRISTIAN SCIENCE MONITOR, Dec. 22, 2000, at 2, available at 2000 WL 4433175.

¹⁰⁹Shannon, *supra* note 103, at 411 (citing Jerry Markon, *Take Me Off Your List! (Pretty Please?)* STAR TRIBUNE (Minneapolis-St. Paul), Dec. 27, 2000, at 1D, also available at 2000 WL 7003353.) Shannon also notes, “No-call laws...offer consumers the ability to opt out of most unwanted sales calls, provided that they are not burdened by exemptions for too many types of solicitors. While some statutes are fairly effective, and some are merely adequate, still others have enough loopholes to render them practically unenforceable.” *Id.*

relationship with the consumer.”¹¹⁰ For example, there are twenty-two different exemptions under Kentucky’s no-call law, making it “one of the weakest in the nation.”¹¹¹ Furthermore, some states have refused to fine telemarketers even though their laws have been in place for several years.¹¹²

In addition to the criticism that these laws do not go far enough in their regulations, any state legislation that regulates the telemarketing industry must also pass constitutional muster. One author has identified two different constitutional issues associated with state telemarketing legislation including federal preemption of state law and “dormant” Commerce Clause analysis.¹¹³ In his article, Michael Shannon notes the decision of the United States Court of Appeals for the Eighth Circuit in *Van Bergen v. Minnesota*, which states that “federal law can preempt state law without an express statement by Congress when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law.”¹¹⁴ However, Shannon also notes the TCPA language that states, “nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations. ...”¹¹⁵ He then concludes that it is unclear whether state telemarketing legislation applies to interstate calls as well, and that “although there is no express statement in the TCPA that indicates Congress wanted to preempt state laws that affect interstate telemarketing, a court might conclude that the statute implied that intent.”¹¹⁶

In his commerce clause analysis, Shannon recognizes that “the Supreme Court has ruled that the Commerce Clause operates on a negative basis to prevent state laws that unduly burden interstate commerce.”¹¹⁷ Under this traditional “dormant” Commerce Clause analysis, state laws are examined to determine whether they substantially interfere with interstate commerce.¹¹⁸ The resulting implication regarding the TCPA is that if a state law were to regulate telemarketing, how would such a law apply to out-of-state telemarketers? In other words, would such a law be regulating the interstate “commerce” of telecommunications, and therefore be in violation of the Commerce Clause itself?

¹¹⁰Markon, *supra* note 109, at 1D.

¹¹¹Shannon, *supra* note 103, at 412.

¹¹²*Id.* (“No Alaska telemarketer has been fined since passage of no-call legislation in 1996. Arkansas has yet to fine anyone either—probably because the state allows telephone solicitors eight to ten free violations. Even states that do fine telemarketers do not...do so to the full extent the laws allow.” (citations omitted)).

¹¹³*Id.* at 413.

¹¹⁴*Id.* at 414 (citing *Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995)).

¹¹⁵*Id.* (citing 47 U.S.C. § 227(e)(1)).

¹¹⁶Shannon, *supra* note 103, at 414.

¹¹⁷*Id.* at 415 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980))).

¹¹⁸*General Motors Corp.*, 519 U.S. at 287.

One particular case that may shed some light on the dormant Commerce Clause issue is *American Library Ass'n v. Pataki*.¹¹⁹ In that case, the United States District Court for the Southern District of New York examined a New York law regarding the transmission of harmful material over the Internet, specifically to children.¹²⁰ The court held the law to be in violation of the Commerce Clause because the Act, "by its terms...applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction."¹²¹ Therefore, the law was "per se violative of the Commerce Clause."¹²²

If the *Pataki* Court's rationale is applied to any state law that attempts to regulate interstate telemarketing activity, then the state laws may be invalidated. To date, such a challenge has yet to occur,¹²³ but appears imminent considering what is at stake for the telemarketing industry.¹²⁴

Regardless, most state laws seeking to regulate telemarketing are too weak to be effective.¹²⁵ More importantly, the inconsistency in state regulations would wreak havoc on the telemarketers who would be constantly striving to comply with the regulations and apply them state-by-state. Furthermore, the state regulations might be a usurpation of federal authority. The only logical solution appears to be a federal remedy, which by its very nature, would be a uniform application of the law. The question, however, is what that federal remedy should entail.

B. The Federal Proposal-A National List

One solution offered by numerous commentators, scholars, and legislators is the creation of a national do-not-call list, whereby one large registry would be formed for people who did not wish to receive telemarketing calls.¹²⁶ The creation of such a list is specifically authorized by the TCPA,¹²⁷ and until recently,¹²⁸ the FCC and the

¹¹⁹*American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

¹²⁰*Id.* at 163.

¹²¹*Id.* at 169-70.

¹²²*Id.* at 183-84. *But see* Shannon, *supra* note 103, at n.288 (citing James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1127 (1999) (arguing that eventually the courts may let the states slide and allow them to regulate out-of-state activity specifically directed to any in-state resident)).

¹²³Shannon, *supra* note 103, at 417 ("The outcome...would likely decide the fate of no-call laws in general: if the states were not permitted to address the problem of out-of-state telemarketers calling state residents, only Congress or the FCC could enact effective do-not-call legislation—something for which neither body has shown much inclination to date.").

¹²⁴Telemarketing companies report that every dollar spent on calls brings back eight times as much in sales, totaling more than \$600 billion annually. *See* Hager, *supra* note 102.

¹²⁵*See supra* notes 108-11 and accompanying text.

¹²⁶*See* Hager, *supra* note 102.

¹²⁷47 U.S.C. § 227(c)(3).

¹²⁸*See* Hager, *supra* note 102.

Federal Trade Commission (hereinafter FTC) have disregarded the option.¹²⁹ However, in 2002, the FTC revisited the idea of a national do-not-call registry and announced a formal proposal.¹³⁰ Under the plan, the FTC would supplement the current company-specific do-not-call provision with an additional provision that will enable a consumer to stop calls from all companies within the FTC's jurisdiction by registering with a central do-not-call list maintained by the FTC.¹³¹ However, there is one large catch in the proposal: the plan itself is limited by the FTC's own jurisdiction, which means that any national do-not-call database would not apply to banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fundraisers.¹³² Not surprisingly, such organizations are among those who make the lion's share of all telemarketing calls.¹³³

However, certain telemarketers, including those selling home repairs, vacations, and financial investments would most likely not be exempt, and under the new rules, telemarketers who make calls in violation of the national list would face fines of up to \$11,000 per violation.¹³⁴ Furthermore, the FTC may also be able to limit calls made on behalf of charitable organizations as mandated by the Patriot Act, which was passed in response to the events of September 11, 2001.¹³⁵

Not surprisingly, such a national registry is likely to meet strong opposition from the telemarketing industry. Robert Wientzen, the president and chief executive of

¹²⁹The Federal Trade Commission (hereinafter FTC) also has jurisdiction regarding the regulation of telemarketing practices. In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act codified at 15 U.S.C. § 6101-08 (West 1998). Pursuant to the authority granted it by the Act, the FTC passed the Telemarketing Sales Rule (hereinafter TSR) in 1995, codified in the Code of Federal Regulations, 16 C.F.R. § 310 (2002). The TSR closely mirrors the FCC's regulations found in 47 C.F.R. § 64.1200, especially regarding the maintenance of company-specific do-not-call lists, time restrictions, and the disclosure of information. See 16 C.F.R. § 310.4(b)-(c). The national do-not-call proposal is one element of the FTC's proposal to modify the TSR. See FTC File No. R411001 (Jan. 22, 2002), *FTC Proposes National "Do-Not-Call" Registry*, available at <http://www.ftc.gov/opa/2002/01/donotcall.htm>.

¹³⁰See Hager, *supra* note 102.

¹³¹See FTC File No. R411001 (Jan. 22, 2002), at <http://www.ftc.gov/opa/2002/01/donotcall.htm>. The proposal also calls for permitting a consumer who registers with the central "list" to receive telemarketing sales calls from an individual company or charitable organization to which the consumer has provided his or her *express* verifiable authorization to make telemarketing calls to the consumer (emphasis added). In addition, the proposal also prohibits the practice of blocking telemarketer name and/or number information for caller identification purposes as well as clarifying that the use of predictive dialers resulting in "dead air" violates the Rule. *Id.*

¹³²Kevin G. DeMarrais, *Curbs on Marketing Calls Sought by FTC*, THE RECORD, Jan. 23, 2002, at A01.

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.* The Patriot Act does not change the exemption of charitable organizations from FTC jurisdiction, but it does "enable the FTC to act against for-profit companies that engage in fraudulent, deceptive, or abusive practices when they solicit contributions on behalf of charities or purported charities." *Id.*

The Direct Marketing Association,¹³⁶ has asserted that “[t]he telemarketing sector is an essential part of ... [the] communications and marketing industry....”¹³⁷ The telemarketing industry also employs more than six million people, and the industry is ready to vigorously defend itself and attack any proposal which “overstep[s] its boundaries by spending taxpayer dollars to limit communication that is protected by the First Amendment to American consumers who benefit from and shop via telephone solicitations....”¹³⁸ The national list may also drive some telemarketers out of the country in order to avoid the new regulations.¹³⁹

A national do-not-call list, if put into effect, also faces severe logistical problems. In 1992, the FCC issued a report along with its regulations prescribed by the TCPA.¹⁴⁰ The report acknowledged that a national list could cost between \$20 million and \$80 million, to implement, and maintenance of the list could cost federal taxpayers up to another \$20 million annually.¹⁴¹ But cost is only the beginning of the problem. The national list would put small businesses at a disadvantage, and ultimately, the additional costs to large and small businesses alike would be passed on to consumers.¹⁴² There are also overriding privacy concerns. For instance, if a consumer is to join the national list, what information must he or she give, and how will that information be protected? What if a consumer, whose number is unlisted but continues to receive telemarketing calls, wants his or her name on the list? How can that individual be sure the information he/she gives remains confidential?¹⁴³ If and when a national list is formed, consumers will likely want suitable answers to such questions.

Another problem faced by a national do-not-call database is obsolescence.¹⁴⁴ The FCC’s report noted that one-fifth of all telephone numbers change each year, and therefore the national database “would be continuously obsolete and would require constant updates in order to remain accurate.”¹⁴⁵ Despite these numerous problems,

¹³⁶The Direct Marketing Association (hereinafter DMA) is a New York-based trade organization that represents some 5,000 companies nationwide. For twenty-five years, the association has maintained its “Telephone Preference Service,” which is essentially a national, privately funded do-not-call list whereby member organizations are prohibited from calling residential telephone subscribers as a condition of membership. See DeMarrais, *supra* note 132, at A01.

¹³⁷*Id.*

¹³⁸*Id.* (quoting DMA president Robert Wientzen).

¹³⁹David Ho, *Rules Aim to Curb Telemarketers*, AP ONLINE, Jan. 22, 2002, available at 2002 WL 10034093.

¹⁴⁰*In re Rules & Regulations Implementing the TCPA of 1991*, 7 F.C.C.R. 8752, 8758-61 (1992).

¹⁴¹*Id.* at 8758 (citing comments of AT&T).

¹⁴²Shannon, *supra* note 103, at 396.

¹⁴³For more on the potential privacy implications regarding a national do-not-call database, see *id.*

¹⁴⁴*Id.* at 401.

¹⁴⁵*In re Rules & Regulations*, 7 F.C.C.R. at 8759.

some commentators favor the national do-not-call list,¹⁴⁶ and the popularity of the idea has yet to fade, as is evidenced by the FTC's latest proposal. However, problems persist because a national list would not include many of the most notorious telemarketers, including phone companies and charities.¹⁴⁷ The FTC simply does not have jurisdiction to limit such telemarketers,¹⁴⁸ and ultimately a national list would not significantly stop those annoying calls which always seem to come at the most inappropriate times. In the end, a national list would only serve to frustrate consumers who continue to get these unwanted calls even though their number is on the national database.

V. THE INEFFECTIVENESS OF STATE AND FEDERAL LAWS

The ineffectiveness of the TCPA as implemented by FCC regulations is likely one of the most significant reasons why states have initiated their own telemarketing regulations.¹⁴⁹ States have recognized the weakness of the federal laws and regulations and have responded by getting tougher on telemarketing. However, the state laws themselves are not perfect.¹⁵⁰ Ironically, many of the state laws also possess the same particular weaknesses of the federal laws, the most significant being the exemptions of nonprofits and other organizations.¹⁵¹ The elimination of these weaknesses should be the goal of any legislation which regulates telemarketing in order to relieve consumers of unwanted solicitation calls.

A. *Private Organizations-A Voice for Frustrated Consumers*

In response to the apparent weaknesses in the present state and federal laws, some consumers have created organizations dedicated solely to the elimination of what they call the "tele-nuisance industry."¹⁵² One such organization is called Private Citizen, and promotes itself as "America's first, largest, and most effective organization of its type to cut your junk calls and junk mail."¹⁵³ Robert Bulmash, a frustrated consumer whom telemarketers seemingly pushed too far, founded the organization in 1988, which sends its members do-not-call requests to over 1,500

¹⁴⁶Shannon, *supra* note 103, at 402 ("Given the choice between a do-not-call system with this level of effectiveness and a company specific system that requires consumers to notify every company not to call them individually, it would seem that Americans prefer the former approach.").

¹⁴⁷*See supra* notes 131-32 and accompanying text.

¹⁴⁸*Id.*

¹⁴⁹*See* Thornton, *supra* note 1, at A1 ("Federal law makes companies keep 'do-not-call' lists....But most consumer activists say the law has loopholes. As a result, some states have laws to create 'do-not-call' lists and to ban or limit...[other telemarketing practices].").

¹⁵⁰*See supra* notes 108-11 and accompanying text.

¹⁵¹*Id.*

¹⁵²Markon, *supra* note 109, at 1D (quoting Robert Bulmash, president of Private Citizen Inc., a consumer advocacy group dedicated to battling the telemarketing industry).

¹⁵³Private Citizen, Inc., Home Page at <http://www.privatecitizen.com> (last visited Aug. 31, 2002).

telemarketing firms nationally.¹⁵⁴ For twenty dollars a year, Private Citizen members authorize the organization to send telemarketers a “contract,” whereby any telemarketer who calls the member without prior authorization agrees to pay that particular member \$100.¹⁵⁵ Although some lawyers argue that such a “contract” may not withstand strict legal scrutiny, many telemarketers who receive do-not-call requests honor these requests anyway.¹⁵⁶

Another consumer organization advocating the eradication of nuisance calls is Junkbusters, which maintains a website dedicated to informing consumers of how to get telemarketers to stop calling.¹⁵⁷ As part of its informational service, Junkbusters publishes a “script” which consumers should use when telemarketers call.¹⁵⁸ By making this script available, consumers will be able to properly inform telemarketers of their desire not to be called again as well as gather information to use as evidence in a potential lawsuit.¹⁵⁹ The Junkbusters website also provides consumers with links to other telemarketing websites as well as an extensive guide on how telemarketing works.¹⁶⁰

Junkbusters also assists consumers in contacting the Direct Marketing Association (hereinafter DMA).¹⁶¹ The DMA, a New York-based trade organization serving the direct marketing field, is perhaps the closest thing to self-regulation by the telemarketing industry.¹⁶² Members of the DMA include 4,800 different businesses who promise not to telemarket DMA members. Some have praised the DMA by acknowledging that it is in the telemarketing industry’s “best interest to avoid calling those consumers who are bothered by telemarketing calls.”¹⁶³ In other words, telemarketing will be more efficient in general if telemarketers refrain from calling those consumers who do not wish to be called and will therefore probably not buy anyway.

Nevertheless, organizations like Private Citizen, Junkbusters, and DMA are limited in their effectiveness. Many consumers are unaware of their services, which

¹⁵⁴*See id.*

¹⁵⁵Michael Miller, *When the “Junker” Calls, This Man Is Ready for Revenge*, WALL ST. J., June 24, 1991, at A1.

¹⁵⁶*Id.*

¹⁵⁷Junkbusters, Inc., Home Page at <http://www.junkbusters.com> (last visited Aug. 31, 2002) [hereinafter Junkbusters].

¹⁵⁸*Id.*

¹⁵⁹*Id.* Junkbusters does not guarantee a consumer success if he or she takes legal action against the telemarketer. However, the organization does inform the consumer about what the law is, what constitutes a violation of the law, and whether such a violation is one for which the TCPA allows a private right of action. *Id.*

¹⁶⁰*Id.*

¹⁶¹*See* Junkbusters, *supra* note 157.

¹⁶²Shannon, *supra* note 103, at 386. The DMA created the Telephone Preference Service, whereby consumers can call and request to have their numbers put on its do-not-call list. This list is then sent to and used by approximately 4800 member businesses nationwide. *Id.*

¹⁶³*Id.*

are limited. Consumers continue to receive unwanted telemarketing calls, and more importantly, private consumer groups and services cannot stop the barrage of unwanted calls from telemarketers who are exempt from the federal regulations, including nonprofits, charities, and political organizations.¹⁶⁴

B. Numerous Exceptions

In defining the term “telephone solicitation,” the TCPA specifically excludes calls made by tax-exempt nonprofit organizations as well as those organizations with which the caller has an established business relationship.¹⁶⁵ Over the eleven-year history of the TCPA, this exclusionary language has been interpreted to apply to most nonprofit organizations, charities, and political organizations/campaigns.¹⁶⁶ However, many of these organizations are often the biggest telemarketing offenders.¹⁶⁷

The irony is that the TCPA does not necessarily mandate exemptions for such tax-exempt, nonprofit organizations.¹⁶⁸ In fact, the solution already exists within the TCPA because it authorizes the FCC to reconsider such exemptions regarding nonprofits and related organizations.¹⁶⁹ Therefore, if the Act is applied to its full potential, charities, tax-exempt nonprofit organizations, and even political groups and organizations would also be subject to the FCC regulations under the TCPA.

In addition, the TCPA also exempts organizations with which the consumer has an established business relationship.¹⁷⁰ At first glance, this exception may seem logical, but such an exception is simply another loophole that telemarketers may attempt to use to bypass punishment under the TCPA.¹⁷¹ For instance, if a consumer requests placement on a telephone solicitor’s do-not-call list for one service but continues to buy a separate service from the soliciting entity, is he or she protected by the TCPA? As will be discussed later, the *Charvat v. Dispatch Consumer Services*¹⁷² case may hold an answer favorable to consumers. Nevertheless, the “established business relationship” exception must be reevaluated and/or eliminated on a national scale in order to protect consumers from the potential abuse such an exception may allow.

¹⁶⁴*Id.* at 388.

¹⁶⁵47 U.S.C. § 227(a)(3).

¹⁶⁶Keala Murdock, *Telemarketers Get Excommunicated*, COLORADO SPRINGS BUSINESS JOURNAL, May 18, 2001, at 4, available at 2001 WL 11294014.

¹⁶⁷DeMarrais, *supra* note 132, at A01.

¹⁶⁸47 U.S.C. § 227(c)(1)(D).

¹⁶⁹*Id.*

¹⁷⁰47 U.S.C. § 227(a)(3).

¹⁷¹*See* Charvat v. Dispatch Consumer Serv., 769 N.E.2d 829 (Ohio 2002).

¹⁷²*Id.*

1. Charities, Politics, and Non Profits — Who Is Really Getting the Money?

As the TCPA dictates, tax-exempt nonprofit organizations are exempt from the regulations imposed by it as well as FCC regulations.¹⁷³ Representative Markey, one of the bill's sponsors, noted that these exemptions were "common sense," and that consumers "do not mind" certain classes and categories of calls, presumably charitable, political, research, and other noncommercial calls.¹⁷⁴ Also, charities and nonprofit organizations enjoy more constitutional protection because their speech is noncommercial.¹⁷⁵ However, even under the "strict scrutiny" test, a state or federal law involving the regulation of these ordinarily-exempted entities could survive constitutional scrutiny as long as it was "narrowly tailored" and there was a "compelling government interest."¹⁷⁶

Furthermore, whether charitable or commercial, many consumers loathe telemarketing calls altogether; and consumer advocates argue that state and federal laws riddled with exemptions for charities and nonprofits do not help in cutting back unwanted calls.¹⁷⁷ Even the telemarketing industry has acknowledged that the numerous exemptions in federal and state laws produce a watered-down effect.¹⁷⁸ According to Matt Mattingly, director of government affairs for the American Teleservices Association, which represents the telemarketing industry, the laws are often bogged down with exceptions, and that is one reason why there is so much dissatisfaction with the current federal rules.¹⁷⁹

Another justification for stripping charities and nonprofits of their exempted status under the TCPA and FCC regulations is that on average, only twenty-four percent of all donations made to charities will actually be received by the charities.¹⁸⁰ The rest usually goes to the telemarketing firm that was hired to make the solicitation calls.¹⁸¹ Sometimes, the charities only receive as little as five or ten percent of the gross donated amount.¹⁸² Such a practice is often a necessary evil for small or unpopular charities that employ solicitors to build a donor base and gain name

¹⁷³47 U.S.C. § 227(a)(3).

¹⁷⁴See Berkenblit, *supra* note 29, at 99.

¹⁷⁵Va. State Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

¹⁷⁶Am. Ass'n of State Troopers, Inc. v. Preate, 825 F. Supp. 1228, 1232 (M.D. Pa. 1993).

¹⁷⁷Jon Van, *Phone Solicitor Restrictions Face Hard Battle Before FTC; Observers Say Eventual Result May Be Watered-Down Rules*, THE CHARLOTTE OBSERVER, Jan. 27, 2002, at 4E.

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¹⁷⁹*Id.* (Mattingly stated, "First, they exempt politicians who are calling for your vote...Then there are charities, and then businesses with which you have an existing relationship. Pretty soon, there are enough exemptions that it's only certain people who can't call you, and the excluded group gets smaller and smaller.").

¹⁸⁰Antitelemarketer.com, at <http://www.antitelemarketer.com/index2k18x6.htm> (last visited Aug. 31, 2002).

¹⁸¹*Id.*

¹⁸²*Developments in the Law — Nonprofit Corporations, IV. Charitable Solicitation*, 105 HARV. L. REV. 1634, 1634.

recognition.¹⁸³ However, this type of contingent-fee solicitation may actually be doing more harm than good. According to one source, “excessive contingent-fee solicitation increases fundraising costs for all charities, reduces actual charitable output, and tends over time to promote the interests of large ‘establishment’ charities over those of newer organizations. Most seriously, contingent-fee fundraising dissipates the substantial goodwill that charities have traditionally enjoyed with the donating public.”¹⁸⁴

When viewed in light of the events of September 11, 2001, the effects of contingent-fee telemarketing seems even more alarming. In response to the terrorist attacks, Americans gave over \$1.4 billion to the survivors.¹⁸⁵ However, three months after the attacks, New York’s Attorney General was already investigating two charities, the New York Firefighters Foundation and the New York Police Scholarship Fund.¹⁸⁶ Both charities were operating out of Florida, and investigators said that both charities had “nothing to do with the city’s fire and police departments.”¹⁸⁷ Consequently, it seems that charities, nonprofits, and related organizations as well as the telemarketing firms they employ are just as fallible and vulnerable to fraud as any other entity that uses telemarketing.¹⁸⁸ For that reason, all tax-exempt nonprofit organizations like charities and political groups should be subject to the same standards as other telemarketers under the TCPA and FCC regulations.

2. The Established Business Relationship Loophole

One of the additional exemptions afforded by the TCPA and FCC regulations is where the party being called has an “established business relationship”¹⁸⁹ with the organization or business doing the telemarketing.¹⁹⁰ At first glance, such an exemption may seem logical. After all, many businesses may want to contact their

¹⁸³ *Id.*

¹⁸⁴ *Id.* See also NBC News: Nightly News, *Profile: Some Charities Getting Very Few of the Dollars We Pledge* [hereinafter NBC News] (NBC television broadcast, Dec. 20, 2001) (transcript available at 2001 WL 24025448).

¹⁸⁵ See NBC News *supra* note 184.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (“Yet last year, according to state records, [both] charities used telemarketers to raise over \$1 million, but got less than ten percent of the donations.” The head of one of the charities said he was not taking advantage of anyone, but he refused to tell NBC News what he did with his ten percent.).

¹⁸⁸ It is estimated that Americans lose \$40 billion a year to fraudulent telemarketers and the FBI estimates that there are 14,000 illegal sales operations bilking consumers in the United States every day. Antitelemarketer.com, *supra* note 180.

¹⁸⁹ 47 C.F.R. § 64.1200 defines “established business relationship” as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber...on the basis of an inquiry, application, purchase or transaction...regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” *Id.*

¹⁹⁰ § 227(a)(3) and 47 C.F.R. § 64.1200(c)(3).

existing customers and the customers themselves may want to hear from the business, especially if the business, for example, is having a special sale or offer only for existing customers.¹⁹¹ However, the exemption can also impose a severe burden to a consumer who unwittingly purchases a product or service from a business. For example, if the business uses the consumer's purchase as a basis to solicit the consumer to buy other products or services that the business produces or provides, the consumer has no recourse because he or she has established a "business relationship" with the company or business, and the soliciting entity may make all the sales calls it wants.

However, a recent decision by the Supreme Court of Ohio in *Charvat v. Dispatch Consumer Services* can be seen as nothing less than an overwhelming victory for consumers on this particular issue.¹⁹² In *Charvat*, the plaintiff subscribed to the Sunday edition of the Columbus Dispatch newspaper.¹⁹³ Although the plaintiff did not wish to receive the newspaper every day, the newspaper continued to place solicitation calls, encouraging Charvat to subscribe on a daily basis.¹⁹⁴ Charvat therefore asked the newspaper to put his number on its do-not-call list, but the newspaper did not heed his request and continued to place sales calls to him.¹⁹⁵ Thereafter, Charvat instituted an action to recover damages pursuant to the newspaper's alleged violations of the TCPA.¹⁹⁶ In affirming the dismissal of Charvat's claim, the Court of Appeals of Ohio, Tenth District, Franklin County, held that the plain language of the TCPA and the FCC's definition of "established business relationship" exempted the newspaper from federal regulations.¹⁹⁷ Therefore, Charvat would have no recourse and would have to continue accepting the solicitation calls from the Columbus Dispatch.¹⁹⁸

In reversing the Court of Appeals' decision, the Supreme Court of Ohio held that "an existing customer can effectively terminate an 'established business relationship' for purposes of the TCPA by requesting to be placed on a 'do not call' list."¹⁹⁹ Moreover, this will not force consumers to terminate all aspects of the business relationship. In Charvat's case, according to the court's decision, he will not have to cancel his Sunday subscription, thus giving him both the protection of the TCPA

¹⁹¹Jerry Markon, "Don't Call" Laws Raise False Hope for Peace, *Quiet*, WALL S. J., Dec. 22, 2000, at B1 (quoting Linda Goldstein, a New York lawyer who represents telemarketers.).

¹⁹²*Charvat*, 769 N.E.2d 829.

¹⁹³*Id.* at 830.

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.*

¹⁹⁷*Charvat*, 769 N.E.2d at 830.

¹⁹⁸*Id.* But see In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, 10 F.C.C.R. 12,391, n.32 ("We emphasize that a request not to be called would also sever an established business relationship. Thus, such a request would obligate a person or entity in an established business relationship with the resident to comply with the rules on telephone solicitation." (citations omitted)).

¹⁹⁹*Id.* at syllabus.

from telemarketing calls by the newspaper, as well as the benefits of his Sunday subscription.²⁰⁰ In other words, the Supreme Court of Ohio's decision gives consumers the best of both worlds; they can continue to purchase a good or service from a business entity, yet also be rid of telemarketing calls from that entity. As the *Charvat* Court held, "[i]t is not consistent with the [TCPA] that a person who subscribes to the daily newspaper in a one-newspaper town must be prisoner to telephone pitches for a publisher's panoply of products."²⁰¹

Situations like that presented in *Charvat* present a legitimate reason as to why the "established business relationship" should be reevaluated and/or eliminated by the FCC. For example, what if the soliciting entity is much larger than a newspaper? Are subsidiaries or parent companies part of the "business" for purposes of establishing a business relationship? The issue has yet to be litigated, but if the term "business" is interpreted expansively, consumers' do-not-call requests ought to be treated the same way as in the *Charvat* decision. Situations like *Charvat* are the precise reason why the loophole needs to be closed. A consumer should never be "forced" to receive telephone solicitations as a mere consequence of him or her buying goods and services, and the *Charvat* decision is definitely a step in the right direction.

VI. SUMMARY AND CONCLUSION

Telemarketing is a booming industry, and is likely to become even larger in the future. However, the industry is unique in that it can come directly into the consumer's home in order to solicit goods, services, and donations. Moreover, the ring of the telephone demands immediate attention, and cannot be ignored, thus making the practice of telemarketing all the more invasive. Yet the public has made it known that big business should never outweigh personal privacy. Consumers' antipathy toward the telemarketing industry is evidenced in state and federal laws, judicial opinions, articles, essays, and also in the popular culture and media.²⁰² The

²⁰⁰*Id.* at 834 ("The FCC does not require that the subscriber stop purchasing from a company associated with the telemarketer. It requires only that the consumer seek to cease the 'voluntary two-way communication' that is the definitional heart of the 'established business relationship.'").

²⁰¹*Id.*

²⁰²Consider comedian Jerry Seinfeld's view of telemarketing, as exhibited in an episode of his NBC sitcom:

UNIDENTIFIED ACTRESS: Well, I...

(SEINFELD): I'm sorry. Excuse me one second.

(PHONE RINGING) Hello.

(TELEMARKETER): Hi, would you be interested in switching over to TMI long-distance service?

SEINFELD: Oh, gee, I can't talk right now. Why don't you give me your home number and I'll call later?

(LAUGHTER)

(TELEMARKETER): Well, I'm sorry. We're not allowed to do that.

public's loathing of telemarketing is perhaps the most amplified on the Internet, where the consumer's collective voice is heard through consumer advocacy websites.

Congress took a big step in enacting the TCPA, which remains to be consumers' most effective weapon in the fight against the telemarketing industry. However, the federal law is replete with loopholes and exemptions, which has prompted many states to draft tougher laws regulating telemarketing. However, doubt remains as to the constitutional validity of the state statutes regarding federal preemption. Moreover, many of the state statutes possess the same exemptions and loopholes as the TCPA, making overall telemarketing regulation fairly ineffective.

In response to growing consumer complaints, the FTC proposed the creation of a national do-not-call registry whereby telemarketing regulation would be uniform on a national scale. Pursuant to the proposal, consumers would conceivably add their own telephone numbers to the list, and the list would then be sold to telemarketers across the nation. However, this proposal faces severe logistical and substantive concerns. The implementation of a national registry would be costly, hard to maintain, and raise serious consumer privacy issues.

In addition, because the FTC has limited jurisdiction, the national registry would not apply to many of the entities that are the most fervent telemarketers, including phone companies and charities, thereby rendering the national list modestly effective at best. A national registry would be more effective if the FCC sponsored the proposal, because the FCC has much broader jurisdiction than the FTC. However, the FCC has not yet expressed any inclination of implementing such a list. Therefore, it would be wise for telemarketing opponents to lobby the FCC for such a proposal, because a "do-not-call" list program sponsored by the FCC would be much more effective than the same proposal sponsored by the FTC.

Another possible solution is to reverse the rationale of the national do-not-call list and make the list one that includes those rare consumers who *want* to be called. The list could then be distributed to telemarketers, who would only call those consumers who consented to being called. Such a proposal would make telemarketing more efficient and telemarketers would know they were calling willing potential customers. If such a list were proposed, perhaps the true status of telemarketing in the minds of consumers would be indicated by how many people signed up to *accept* telemarketing calls.

Currently, federal and state anti-telemarketing laws are relatively weak and need to be strengthened by the reevaluation and/or elimination of exemptions for tax-exempt nonprofit organizations, including charities. While there is strong public policy in favor of an exemption for charities, an alarmingly vast amount of all money donated will go straight into the hands of telemarketers, and not the charities. Furthermore, the contingent-fee telemarketing on behalf of charities is exceedingly susceptible to fraud. As an alternative, why not allow the consumers the choice of not only to what charity they will donate but whether or not to donate at all? By

SEINFELD: I guess you don't want people calling you at home.

(TELEMARKETER): No.

SEINFELD: Well now you know how I feel.

CNN Today: *Several States Considering Legislation That Would Restrict Telemarketing* (CNN Television Broadcast, Jan. 12, 2001) (transcript available at LEXIS, News, Transcript # 01011211V13).

nudging consumers to take a little initiative, money donated would go directly to the charity of choice, and the telemarketers would be cut out of the loop completely.

As far as the “established business relationship” loophole is concerned, cases like *Charvat* are a step in the right direction for the rights of consumers. If the *Charvat* rationale becomes national policy, consumers will have the benefit of being able to purchase goods and services from whomever they want without having to worry about another telemarketer invading their homes. As the *Charvat* Court so prudently noted, “[t]he purpose of the [TCPA] is to reduce the nuisance aspect of telemarketing. Maintaining some commercial tie to a business should not leave consumers at the mercy of unbridled telemarketing efforts.”²⁰³

A complete ban on telemarketing, although arguably constitutional, would likely meet strong resistance. A \$600 billion per year industry employing over 6 million people is vital to a thriving economy and is likely to put up a substantial fight. Moreover, a small minority of the population may actually enjoy telemarketing calls. Nevertheless, the larger majority should have the benefit of more stringent regulations on the telemarketing industry as a whole. Many consumers find telemarketing of all types equally frustrating, and they are entitled to laws that actually protect them. Federal and state laws that are replete with loopholes and exemptions fix only part of the problem. Congress, along with the FCC and state governments, must act to purge the anti-telemarketing laws of loopholes that make the laws weak and ineffective. Once these exemptions are eliminated, the laws will be more effective, efficient, and useful to the consumer.

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²⁰³*Charvat*, 769 N.E.2d at 834.

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